



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELCC NO. 56 OF 2017**

**(Formerly Kisii ELCC No. 1230 Of 2016 and Kisii HCC No.4 of 2004)**

**SAMWEL ORWA WAYUGA.....PLAINTIFF**

**VERSUS**

**THE CHURCH COMMISSIONERS FOR KENYA**

**OF THE ANGLICAN CHURCH OF KENYA.....DEFENDANT**

**RULING**

1. A Notice of Motion application dated 1<sup>st</sup> December 2016 was filed under certificate of urgency by M/S Oguttu Mboya and company Advocates for the Defendant/Applicant against the Plaintiff/Respondent pursuant to Order 40 Rules 1, 2 4 and 10 Civil Procedure Rules, 2010, Sections 1A,1B,3A, 63 (e) and Articles 28, 48, 159 and 165 Constitution,2010 and all enabling provisions of the law. He is seeking the following orders;

- a. The application herein be certified urgent and the same be heard Ex-parte in the first instance.
- b. Pending the hearing and determination of the instance Application, the Honourable Court be pleased to grant an Interim Order of Injunction restraining the Plaintiff/Respondent either by himself, agents, servants, employees and/or anyone claiming under the Plaintiff/Respondent, from further entering onto, re-entering, trespassing onto, putting Beacons, Fencing, Leasing, Buildings Structures, interfering with and/or in any other manner Dealing with **Plot Number 3699, Kasungu/Kamreri Adjudication Section** and in particular, the portion where the Defendant's/Applicant's Church stand on.
- c. In the alternative and without prejudice to the foregoing, pending the hearing and determination of the instant Application the Honourable, court be pleased to order and/or direct the maintenance of Status Quo, currently obtaining over and in respect of Plot Number **36699, Kasungu/Kamreri Adjudication Section**, barring and/or prohibiting the Plaintiff/Respondent from further entering onto, re-entering, trespassing onto, putting Beacons, Fencing, Leasing, Building Structures, interfering with and/or in any other manner Dealing with Plot number 3699, **Kasungu/Kamreri Adjudication Section** an inparticular, the portion where the Defendant's/Applicant's Church stand on.
- d. The Honourble court be pleased to grant an Order of Temporary Injunction restraining the Plaintiff/Respondent either by himself, agents, servants, employees and/or anyone claiming under the Plaintiff/Respondent, from further entering onto, re-entering, trespassing onto, putting Beacons, Fencing, Leasing, Buildings Structures, interfering with and/or in any other manner Dealing with **Plot number 3699, Kasungu/Kamreri Adjudication Section** and in particular, the portion where the Defendant's/Applicant's Church stands on, pending the hearing and determination of the

intended Appeal to the Honourable Court of Appeal.

e. The Honourable Court be pleased to order and/or direct the Maintenance of status Quo, currently obtaining over and in respect of **Plot number 3699, Kasungu/Kamreri Adjudication** Section, barring and/or prohibiting the Plaintiff/Respondent from further entering onto, re-entering, trespassing onto, putting Beacons, Fencing, Leasing, Buildings Structures, interfering with and/or in any other manner Dealing with **Plot number 3699, Kasungu/Kamreri Adjudication Section** and in particular, the portion where the intended Appeal to the Honourable Court of Appeal.

f. Cost of this Application be borne by the Defendant's/Respondents.

g. Such further and/or other orders be made as the court may deem fit and expedient.

2. The grounds of the application are (a) to (hh) on the face of it. A Supporting affidavit of paragraphs 1 to 25 sworn on 1<sup>st</sup> December 2016 by Rev.James.K Ochiel and annexed documents marked JKO 1 (a), (b) to JKO (2) are in support of the application.

The Respondent's counsel G.S Okoth filed seven (7) grounds of opposition dated 28/12/2016 in response to the application. The grounds are supported by a Replying affidavit of 14 paragraphs sworn on 28<sup>th</sup> December, 2016 by Maurice Odhiambo Gambi. The seven (7) grounds are;

a. **The Court did not decree vacation or removal of the Church house but only made a finding that the same is erected on the plaintiffs land and the court therefore issued an order of permanent injunction directed at the defendant but suspended the injunction for 12 months**

b. **Ownership of Plot No. 3699 was never in issue and since the same belongs to the plaintiff he exercises proprietary rights save that he cannot enforce the injunction until after 12 months**

c. **The applicant has full knowledge as to the person who they allege to have entered the land and have communicated to him. Therefore this application is an abuse of the court process.**

d. **The court did not make any orders directed at the plaintiff, however the plaintiff has not done any thing at or against the church.**

e. **The allegations are vague equivocal and fail to mention any specific act or omission by the plaintiff/respondent.**

f. **Plot No. 3700 whose beacons were fixed is far from the Church compound and is not on the suit land at all.**

g. **The affidavits dated 1.2.2016 consists of hearsay and argument and is devoid of facts and therefore flouts the provisions of Order 19 rule 3 the Civil Procedure Rules.**

3. On 2<sup>nd</sup> February 2016 John Mutungi, J sitting at Environment and Land court, Kisii referred to the judgment he delivered on 27<sup>th</sup> June 2016 but which had been written and signed by S Okongo, J on 23<sup>rd</sup> June, 2016. He noted that the net effect of the judgment was that Status Quo was to be maintained for twelve months from the date of the judgment. He directed the status quo to be observed until on 8/2/2017 for directions. On 8<sup>th</sup> February, 2017, the court ordered that status quo be maintained.

4. On 23<sup>rd</sup> February, 2017, I received oral submissions from Ms Mireri counsel instructed by Oguttu Mboya for the Defendant/Applicant and Nyarige counsel instructed by G.s Okoth for the Plaintiff/Respondent. Both counsel relied on affidavits and documents filed in court.

5. I have considered the entire application, grounds of opposition and submissions by both counsel. I

proceed to resolve whether the Defendant/Applicant is entitled to the orders sought in the application.

6. The orders sought in the application are injunctive in nature and for maintenance of status quo obtaining over and in respect of **Plot No. 36699, Kasigunga/Kamreri Adjudication Section**. The grounds of opposition include that the court made a finding that the church house is erected on the plaintiff's land and issued an order of permanent injunction directed at the Defendant but suspended the injunction for 12 months.

7. There is no dispute that the court entered judgment in favour of the Plaintiff/Respondent on 27th June, 2016 and issued an order for a permanent injunction against the Defendant in respect of **plot No. 3699 Kasigunga/Kamreri Adjudication Section**. The court suspended the permanent injunction for a period of twelve months from the date of judgment. At page 13 order (c) of the judgment, the court directed thus;

***“ the injunction granted in (b) above shall be suspended and/or stayed for a period of twelve (12) months from the date hereof to enable the defendant to look for alternative premises for it's members to worship”***

8. The court had the sole discretion to grant the injunction and suspend it for twelve (12) months in the circumstances of the case..In **National Bank of Kenya Limited vs-Shimmers Plaza Limited (2009) 1 KLR 278 at 283**, it was observed, **inter alia**

*“that an injunction is an equitable and discretionary remedy. The duration of an order of an injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case.”* (Emphasis added)

9. The period of suspension and or stay of the permanent injunction is still running. The parties have to abide by the judgment of the court. The Plaintiff/Applicant is at liberty to implement and /or enforce the decree only after the expiry of twelve (12) months from the date of judgment.

10. The Defendant has sought to maintain the status quo until the hearing and determination of the intended appeal. In **Abel Salim & Another-vs-Okong'o & others (1976-80) 1 KLR 53 at 60**, the court held in part as follows;

***“There is no question here of maintaining the status quo until the hearing of the suit.”***

In the circumstances of the case, the obtaining status quo shall only be observed and maintained for twelve (12) months from the date of judgment which was delivered on 27<sup>th</sup> June, 2016. Moreover, the Defendant/Applicant has intended to appeal from the said judgment.

11. Consequently and for those reasons, I disallow the application dated 1<sup>st</sup> December, 2017 by the Defendant/Applicant.

12. Each party shall bear own costs bearing in mind the character of the application and the proviso to **Section 27 (1) Civil Procedure Act (Cap 21 Laws of Kenya)**

**G. M. A. ONGONDO**

**JUDGE**

**DELIVERED, SIGNED and DATED at MIGORI this 8th day of March, 2017.**

**In the presence of;**

**Mr Godia instructed by Oguttu Mboya for the Defendant/Applicant**

**Non appearance for the Plaintiff/Respondent**